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No. 54

In the

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,

Petitioner,

v.

DOROTHY ANNE STAPF AND B. T. WARE, II, Executors and Trustees of the ESTATE OF LOWELL H. STAPF, Deceased, AND DOROTHY ANNE STAPF, Individually,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 28-47) is reported at 189 Fed. Supp. 830. The opinion of the Court of Appeals (R. 64-96) is reported at 309 Fed. 2d 592.

JURISDICTION

Respondents do not deny or question jurisdiction.

QUESTIONS PRESENTED

Respondents submit that the questions presented are more accurately stated as follows:

1. Should the agreed value of property, passing to the surviving spouse under the will of the decedent and otherwise qualifying for the marital deduction, be reduced to zero in determining the estate tax liability of the decedent's estate because the surviving spouse exercised an option, as she was authorized to do under the decedent's will, in effect giving to the trustees of a testamentary trust, for the children of the decedent and the surviving spouse, an undivided interest in a part of her fully vested share of the community property of a greater value than the property passing under the will to the surviving spouse?

2. Whether claims against the community estate, which the decedent's will directs be paid entirely from his half of the community estate, are deductible in full from the decedent's gross estate within the meaning of Section 812(b) of the Revenue Code of 1939, as amended, or if not so deductible under such section, should, to the extent the will requires the portion of the debts, as would otherwise be chargeable to the survivor, be paid from the decedent's estate and not that of the surviving spouse, be treated as additional bequests to the surviving spouse qualifying for the marital deduction?

3. Whether costs of administration to the extent otherwise chargeable to the survivor, which the decedent's will directs to be paid entirely from his half of the community estate,

are deductible in full from the decedent's gross estate within the meaning of Section 812 (b) of the Revenue Code of 1939, as amended, or if not so deductible under such section, should, to the extent the will directs such debts to be paid from the decedent's estate and not that of the surviving spouse, be treated as additional bequests to the surviving wife, qualifying for the marital deduction?

STATUTES AND REGULATIONS INVOLVED

Section 812(b) and 812(e) of the Internal Revenue Code of 1939, as amended (26 U.S.C. 1952 Ed.) and Sections 81.36, 81.47a, and 81.47c of Treasury Regulations 105 are set forth in part in App. A, Infra, pp. 1a to 5a.

Unless otherwise noted, references will be to the 1939 Internal Revenue Code, as amended.

STATEMENT

This is an action for a refund of estate taxes allegedly erroneously assessed and paid. The facts are stipulated. Two claims of the respondent taxpayers for refund, both of which were allowed by the Court of Appeals, are presented for review by the granting of the Government's Petition for Certiorari:

1. The claim of respondent taxpayers that the Commissioner erred in reducing to zero, in determining the marital deduction, the value of identifiable property passing to the surviving spouse under the will of the decedent and other-

wise qualifying for the marital deduction, because the surviving wife elected to take under the will, which disposed of the entire community estate, and as a result of the exercise of the option granted to her received from her deceased husband, under his will, and retained by her out of her community estate less than she would have retained out of her community property had she elected not to take under the will. The District Court (R. 28, 40-47) held for the taxpayer that the value of the property passing to the surviving spouse under the will of the decedent should not be so reduced in determining the marital deducting as a result of such facts. The Government appealed from such portion of the judgment of the District Court and the Court of Appeals for the Fifth Circuit affirmed such portion of the pudgment of the District Court and held for the taxpayer thereon (R. 64, 71-74). Judge Wisdom dissented.

2. The claim of the respondent taxpayers that the Commissioner erred in refusing to allow, as a deduction from the gross estate in determining the taxable estate, the full amount of administration expenses of the estate of the decedent and the full amount of claims against the entire community estate, all of which the will of the decedent directed to be paid out of his portion of the community property and his separate estate. The District Court held for the Government and against the taxpayers upon such issue (R. 28, 32-40). The respondent taxpayers appealed from such portion of the trial court's judgment to the Court of Appeals

for the Fifth Circuit. The Court of Appeals held for the taxpayers and reversed the District Court on such issue (R. 64-71). Judge Wisdom dissented.

Initially, an additional claim for refund based on the error of the Commissioner of including in the gross estate of decedent a portion of life insurance proceeds not properly includable was presented. The District Court held for respondent taxpayers on such issue (R. 28, 31). The Government did not appeal from the determination of such issue by the trial court but conceded the correctness of such conclusion in Note 3, p. 9, of its brief as Appellant in the Court of Appeals.

Lowell H. Stapf died July 29, 1953, a resident of Texas, and was survived by his wife, Dorothy Anne Stapf (R. 48). His estate, exclusive of life insurance, consisted of certain real property in the city of Amarillo, Texas, of the agreed value of $65,000.00 and certain hand tools of the agreed value of $100.00 (R. 54), which constituted his separate property and estate. Additionally, he owned with his wife community property of the gross value of $258,104.54 (R. 53, 54-55). The total amount of debts, all of which were community debts, was $32,367.74 (R. 51, 55, 65). Administration expenses totaled $4,073.47 (R. 51).

Section I of the will of the decedent, Lowell H. Stapf (R. 7), disposed of not only the separate property of the decedent but the entire community and requested his wife to take under the will and waive her right to one-half of the community property. The will provided that if she did not

elect to take under the will that she would receive no interest in the separate property of the decedent.

Section III of the will (R. 8) contained a special devise of $5,000.00 and personal machinist's hand tools of the value of $100.00 (R. 50, 54) to decedent's son, Lowell H. Stapf, Jr. Section IV of the will devised to Dorothy Anne Stapf the family automobile and one-third of the residue of the total estate after the bequest to Lowell Stapf, Jr. and the family automobile to Mrs. Stapf (R. 8). The family automobile was community property and had a total value of $1400.00 (R. 53, 54). Sections V, VI, VII and VIII of the decedent's will (R. 8-12) devised the residue of the estate remaining after satisfying the special bequests to Lowell Stapf, Jr., and to the surviving wife, Dorothy Anne Stapf, to B. T. Ware, II, and Dorothy Anne Stapf, Trustees in trust for the benefit of Lee Dale Stapf, Donald Eric Stapf and Sylvia Rose Stapf.

Section XII of the decedent's will (R. 13-14) directed the executors to pay all of and not merely one-half of all funeral expense, costs of administration, taxes and debts out of the decedent's one-half community estate and separate property and provided that no part of such debts and expenses should be charged against the one-half share of the surviving wife in the community property. Such section further provided that if the surviving spouse did not elect to take under the will the debts of the estate, funeral expenses and costs of administration should be charged against the one-half community estate of Dorothy Anne

Stapf and the one-half community estate of the decedent in accordance with the laws of the State of Texas.

Had Mrs. Stapf not elected to take under the will, her one-half of the community property ($129,052.27) would have been charged with one-half of the community debts ($16,183.87) and 35% of the administration expenses ($1,425.72) (R. 54-55, 59, 66 N. 2), and she would have retained her fully vested community property of a net value of $111,442.68 (R. 55, 65).

Mrs. Stapf elected to take under the will after the death of her husband and the offer of his will to probate. Under the will she received from her husband, one-third of the decedent's separate property remaining after the special devise of hand tools was satisfied of a total valuation of $65,000.00 and his one-half interest in the autmobile. Thus she received $21,666.66 of decedent's separate property plus the decedent's one-half interest in the community automobile of a value of $700.00, or the total amount of $22,366.66. Additionally, Mrs. Stapf retained her one-half interest in the family automobile and one-third of the residue of the community property remaining after satisfying the special bequest to Lowell Stapf, Jr., and to Mrs. Stapf, of a total value of $106,268.18, as computed by the District Court and Court of Appeals (R. 54, 65), or $106,968.18 if computed as petitioner has computed the amount on page 4 of its brief.

By her election, Mrs. Stapf surrendered to the trustees for the benefit of the beneficiaries the difference between the portion of the community estate retained by her after

she had exercised her election, to wit, $83,901.52 (R. 54)[1], and the net amount that she would have retained had she elected not to take under the will of the decedent, to wit, $111,442.68, or a difference of $27,541.16 (R. 65), as determined by the District Court and the Court of Appeals. Petitioner computes the amount Mrs. Stapf gave to the trustees for the benefit of her children to be $26,841.16 (Pg. 5 of brief). The exact amount is immaterial for our present purposes.

In its estate tax return the decedent's estate claimed a marital deduction under Section 812(e) of the Internal Revenue Code for the full value of the decedent's property (one-third interest in the lots in the city of Amarillo and one-half interest in the family automobile of the aggregate value of $22,366.66) that passed to the surviving wife under the will of the decedent. The estate additionally claimed a deduction for the entire $32,367.74 of community debts as "claims against the estate" under Section 812(b)(3) and for the entire $4,073.47 of expenses as "administration expenses" under Section 812 (b)(2).

The Commissioner of Internal Revenue disallowed the marital deduction and the portions of the deductions for

[1]If the will had not provided and required that the debts and expenses of administration, otherwise chargeable to Mrs. Stapf's share of the community, be charged against and paid out of Mr. Stapf's share of the community or had not provided for Mrs. Stapf to receive ½ of the gross estate (less bequests), undiminished by debts and expenses, then the part Mrs. Stapf would have retained from her part of the community would have been reduced by the sum of $17,609.59 (the amount of debts and expenses that would have been chargeable to her portion of the estate but for the will provisions) or the sum of $66,292.93. Mr. Stapf effectively made an additional testamentary bequest to Mrs. Stapf of $17,609.59 by assuming and directing the payment of these debts and expenses out of his part of the total estate and excusing Mrs. Stapf's property from such charges.

claims and administration expenses representing the debts (50%) and the expenses (35%) attributable to the wife's half of the community property. As first noted in this statement, the District Court allowed the full marital deduction claimed by respondent taxpayers but upheld the disallowance of claims and expenses (R. 59). The Court of Appeals (R. 74) uphold both claims asserted by respondent taxpayers.

SUMMARY OF ARGUMENT

I. Marital Deduction

This case only relates to the quantum of liability of the decedent's estate for estate taxes. The question of the liability and extent of liability of the surviving spouse for gift taxes as the result of her gift of her community property to the trustees for the benefit of the children is not involved or presented for decision. As the result of the exercise of her option to take under the will of Mr. Stapf, two events occurred:

1. One-third interest in the separate property of Mr. Stapf and his one-half interest in the family automobile passed absolutely to Mrs. Stapf. The total value of the property and property interests so passing is $22,366.66. Such property so passing meets all of the requirements of Section 812(e) of the Revenue Code of 1939 and is deductible as a marital deduction in determining the ultimate estate tax liability.

2. Mrs. Stapf surrendered or gave to the trustees for the benefit of the children, absolutely, an undivided interest in

her one-half of the community property represented by the difference between ½ of the net community estate and ⅓ of the gross estate. This difference is $26,841.16 according to the Government's calculations.

The property passing to Mrs. Stapf under the will fully qualifies for the marital deduction since all requirements of Section 812(e) are met. The act of the Commissioner in refusing to allow the marital deduction by reducing the value of such property to zero because Mrs. Stapf, as a result of the exercise of her option to take under the will, gave to her children property of greater value is contrary to and violates the provisions of the marital deduction statute. The regulations of the Commissioner authorizing such action are an unauthorized and unwarranted extention of the statute and go beyond the language, purpose and intent of such act, and are contrary to the applicable law as announced by this Court in *Commissioner v. Wemyss, 324 U. S. 303.*

To contend, as the Government contends, that Mr. Stapf, but not Mrs. Stapf, actually or constructively, made a gift to the trustees for the benefit of the children ignores what actually occurred and, as determined by both the District Court and Court of Appeals, is contrary to both the facts and the established applicable law as determined by this Court in decision in *Commissioner v. Wemyss, 324 U. S. 303*, and the requirements of Section 812(e).

If the position of the Government is sustained, the effect will be to subject the $22,366.66 of property passing to Mrs. Stapf under the will of Mr. Stapf to estate taxes twice.

Once in Mr. Stapf's estate and again in Mrs. Stapf's estate, should she die possessed of it, contrary to the purpose and intent of Section 812(e) that property so passing and qualifying for the marital deduction should be subjected to only one estate tax. The Government's position would effectively tax (to the extent of the value of the property passing to Mrs. Stapf) the gift of Mrs. Stapf to the trustees under the estate tax statute but not under the gift tax statute and at estate tax rates rather than at gift tax rates to which her gift is properly subject.

II and III. The Deduction for Claims Against the Estate and Administration Expenses

Under Section 812(b) of the Internal Revenue Code, debts and expenses, which are deductible in determining the net estate for estate tax liability, are those allowed by the laws of the jurisdiction under which the estate is being administered. Thus, the laws of Texas, which permit a testator, by the terms of his will, to charge all debts and expenses against his portion of the estate, should be given effect and such debts and expenses should be allowed as deductions in their entirety as directed by the will of the decedent in determining the estate tax liability of the decedent's estate.

If the debts and expenses, otherwise chargeable to Mrs. Stapf's part of the community and which the will orders be paid out of Mr. Stapf's estate, are not deductible in his estate under Sec. 812(b), then the amount thereof qualifies for the marital deduction and should be deducted from

decedent's gross estate under Sec. 812(e) to the extent that such amounts when added to the other amounts qualifying for the marital deduction, do not exceed 50% of the value of the "adjusted gross estate" under Sec. 812(e)(1)(H). This is true because, to the extent that the decedent assumed and ordered paid out of his estate debts and expenses that would have otherwise been charged to Mrs. Stapf, the decedent made a testamentary gift that qualifies for the marital deduction provisions of Sec. 812(e).

ARGUMENT

I

The opinions and judgments of the District Court and the Court of Appeals are correct in holding that the separate and community property of the decedent, passing to surviving wife under the husband's will, qualified for the marital deduction and that the value thereof should not be reduced because the surviving wife, by the exercise of the option granted under the will gave, to the trustees for the benefit of her children, a portion of her one-half interest in the community property of a greater value than the property passing to her under the will of her husband.

We are concerned here only with the estate tax liability of Mr. Stapf's estate. The liability of Mrs. Stapf for gift taxes with respect to the property interest given to the trustees for the benefit of her children out of her part of the community property, and never included in her husband's estate, is not presented for decision. Mrs. Stapf has

never denied the gift tax consequences of her gift, but such consequences are not in issue in this case.

As determined by both the District Court and Court of Appeals and as admitted by the Government (page 5, Note 4 of brief), the property that passed to Mrs. Stapf under the will of Mr. Stapf was a one-third interest in his separate property (consisting of real property in Amarillo, Texas) and his one-half community interest in the family automobile of the aggregate agreed value of $22,666.66. It is conceded by the Government (page 5, Notes 4 and 5), as determined by the Court of Appeals (R. 71), that under Texas law the devise of one-third of the whole community to Mrs. Stapf did not pass to her under the will of the decedent but was satisfied out of her own one-half of the community property. *Jones v. State, Texas Comm. of App. 1928, 5 S. W. 2d 973*, and *Calvert, Comptroller, v. Fort Worth National Bank, Texas Supreme Court 1962, Tex. , 356 S. W. 2d 918.* By her election, Mrs. Stapf gave to the trustees for her children the difference between her one-half interest in the community estate which was fully vested in her, diminished by the debts chargeable to her, and the one-third interest in the residue of the community which she retained.

Only the decedent's one-half part of community property of a Texas resident is included in his gross estate for Federal estate tax purposes, because the ½ interest of the surviving spouse in the community property is a fully vested interest and not a mere expectancy. The interest of the first of the spouses to die is all that is included in his

estate. An excellent discussion of Texas community property system and its application in Federal Estate Tax matters, is contained in *Commissioner of Internal Revenue v. Chase Manhattan Bank, C. A. 5th Cir. 1958, 259 Fed. 2d 231, cert. denied 359 U. S. 913.* It is there said at page 239:

> "* * * Upon the death of either spouse, a community property state levies an inheritance tax on the decedent's half of the community. Since 1948 (and prior to 1942), only the decedent's half is includible in his gross estate for federal tax purposes."

In *Pitts v. Hamrick, C. A. 4th Cir. 1955, 228 Fed. 2d 486,* it is stated:

> "* * * where the widow's interest in the estate is allowed as a marital deduction, we look to the law of the state for the purpose of determining the amount of that interest."

It is clear that by electing to take under the will the one-half community interest of the wife is not included in the gross estate of the husband for tax purposes even though the wife's one-half community share, as well as the husband's one-half community share, was disposed of by the will of the husband. This is true because under Sec. 811(a) of the Revenue Code, the gross estate of the decedent includes only the interest of the decedent at the time of his death. Mertin's Law of Federal Gift and Estate Taxation, Sec. 11.02, Vol. 1, p. 687.

Any question in this regard is removed by GCM7773, CB IX-2, Page 426, Ruling 33-4750, which refers to Section 302(a) of the Revenue Act of 1926, which is virtually

identical, if not exactly identical, to the provisions of the Revenue Act in force at the time of the death of the decedent. (See Section 302(a) of 1926 Act and Section 811(a) of the 1939 Internal Revenue Code.) The GCM was based upon two cases in the Northern District of Texas, namely *Vincent v. United States* and *Underwood v. Reed.* The ruling is stated briefly as follows:

> "The husband, a resident of Texas, died leaving a will by which he devised to his wife and two children his entire separate estate, together with the entire community estate owned by himself and wife. The wife elected to take under the will.
>
> "HELD, that the interest which the wife has, under the laws of Texas in the community estate is not a part of the deceased husband's gross estate within the meaning of Section 302(a), Revenue Act of 1926, notwithstanding the wife elected to take under the will."

See also: *Coffman-Dodson Bank & Trust Co., Executor, 20 B. T. A. 890,* and *The Pacific National Bank of Seattle, Executor, 40 Board of Tax Appeals 128,* where the headnote states the ruling as follows:

> "(1) Where the wife of a decedent in a community property state (Washington) waives all her interest in the marital community and acquiesces in the creation by her husband of a testamentary trust disposing of all his property (with unimportant exceptions), including all community property, HELD, that there is no present transfer to the husband by reason of the waiver which will justify the inclusion of the wife's share of the community property in the decedent's gross estate."

Since the only property that passed to Mrs. Stapf from Mr. Stapf, under the will of the decedent, was the one-third

interest in the separate property and the one-half interest in the automobile, and since no part of Mrs. Stapf's community property is included in Mr. Stapf's estate, the respondent taxpayers do not contend that any part of the community estate owned by Mrs. Stapf qualifies for the marital deduction but assert, as determined by both the District Court and the Court of Appeals, that the interest in the separate property and one-half interest in the family automobile passing to the wife fully qualify for the marital deduction.

It is submitted that the circumstances under which such property so passed to Mrs. Stapf meets and satisfies all of the requirements of Section 812(e) of the Code. The one-third interest in the separate property and the one-half interest in the community automobile were included in the gross estate of the decedent as required by Section 812(e)(1)(A); the full and complete interest and title and not merely a terminable interest in the separate property vested in Mrs. Stapf as required under Section 812(e)(1)(B). The Government does not claim that the property passing to Mrs. Stapf was an interest in unidentified assets under Section 812(e)(1)(C) nor that the interest of Mrs. Stapf was conditioned upon her survival for a limited period under Section 812(e)(1)(D); nor is any claim made that the assets passing to Mrs. Stapf would not qualify as a marital deduction under Sections 812(e)(1)(F), (G) or (H); nor is any claim made that such property passing to Mrs. Stapf is disqualified under Section 812(e)(2).

The only issue raised by the Government as to the deductibility of the agreed value of the one-third interest in the

separate property and the one-half interest in the automobile passing to Mrs. Stapf is under Section 812(e)(1)(E) and particularly subsection (ii) thereof.

Section 812(e)(1)(E) reads as follows:

> "(E) Valuation of interest passing to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—
>
> "(i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such interest; and
>
> "(ii) where such interest or property is incumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such incumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

Reduced to its simplest form, the basic contention of the Government is that since Mrs. Stapf exercised, after the death of her husband, the option granted to her in the will of electing to take under the will, the actual and agreed value of the property she received under the will should be assumed to have a zero or negative value in computing the marital deduction, thereby denying such deduction and increasing the estate tax liability in Mr. Stapf's estate as a result of "netting" what Mrs. Stapf received under the will and what she gave up by way of gift to the trustees. Obviously, the motivating force behind the Government's conten-

tion is its fear that in computing *gift taxes* on *Mrs.* Stapf's *gift*, made of her free choice after her husband's death, to the trustees for her children, the amount of her gift to the children may be reduced by the amount she previously received under her husband's will. Thus, the Government would deny the marital deduction in Mr. Stapf's estate thereby increasing the decedent's estate taxes in order to offset the possible loss of gift taxes owing by Mrs. Stapf.

The Government seeks to attain its basic objective of denying the marital deduction in this case by various arguments that circumvent the clear statutory language of Section 812(e)(1)(E)(ii) as well as the intent of Congress as clearly expressed and set forth in SENATE REPORT 1013, March 16, 1948, U. S. Code Cong. Service, Part 2, 80th Congress 2d Session, pp. 1163, 1188-1191, and SUPPLEMENTARY SENATE REPORT No. 1013, March 17, 1948, U. S. Code Cong. Service, Part 2, 80th Congress 2d Session, pp. 1222, 1224-1252.

The basic fallacy in the Government's position is that it seeks to fix the estate tax liability of the decedent's estate and the amount of taxable property includable therein for estate tax purposes on the basis of what it asserts to be the gift tax liability of Mrs. Stapf for gift taxes arising as a result of her gift to the trustees for the benefit of her children. The Government seeks to substitute the net benefit to Mrs. Stapf, used in determining her gift tax liability for her gift, for the value and amount of property passing to her and permitted to be deducted under Section 812(e)(1)(E) in determining the taxable estate of Mr. Stapf for estate tax purposes and the amount of estate taxes payable by Mr.

Stapf's estate. Mrs. Stapf's gift tax liability has no bearing upon the value *vel non* of the property included in Mr. Stapf's estate and passing to her.

In support of the position asserted by it, the Government relies upon Commissioner's Regulation 105, Section 81.47c (b), examples 1 and 3. Both the District Court (R. 28, 44) and the Court of Appeals (R. 64, 72) held that such regulation was an extension beyond the statutory language and the clear intent and purpose of Congress and that such regulation must give way to the statute, which permits the deduction of the value of the property passing to Mrs. Stapf in determining the taxable estate. Regulations of such character, as are the regulations here involved, as determined by both the District Court and the Court of Appeals, are invalid. *Commissioner v. Acker, 361 U. S. 87, 92; United States v. Calamaro, 354 U. S. 351, 358-359; Koshland v. Helvering, 298 U. S. 441, 446-447.*

Section 812(e)(1)(E)(ii) requires an "incumbrance or obligation" to be taken into account in valuing the property. Since the property that passed to Mrs. Stapf was not incumbered with a mortgage or like indebtedness, we must determine the meaning of "obligation" as used in the statute. SENATE REPORT 1013, March 18, 1948, U. S. Code Cong. Service, Part 2, 2d Session, pp. 1163, 1227-28. It is there explained:

> "Subparagraph (E) of Section 812(e)(1) specifically provides for the application in determining the value of any interest in property passing to the surviving spouse of rules which are generally applicable in determining the net value of any gift or bequest. * * *.
>
> "Clause (ii) of such subparagraph (E) directs that in determining the value of any interest passing from

> the decedent to the surviving spouse, incumbrances or obligations shall be taken into account in the same manner as if the value of a gift to the spouse of the interest passing were being determined. This is a clarification which was not expressed in the bill as passed by the House. If the decedent by his will leaves to his surviving spouse real estate subject to a mortgage (whether or not such mortgage was a personal liability of the decedent) the value of the interest passing to the surviving spouse does not under this section include the mortgage. If, however, the decedent by his will directs the executor to pay off the mortgage, such payment constitutes an additional interest passing to the surviving spouse. If the decedent bequeaths certain property to his surviving spouse subject, however, to her agreement, or a charge on the property, for payment of $1,000 to X, the value of the bequest (and, accordingly, the value of the interest passing to the surviving spouse) is the value, reduced by $1,000, of such property."

The "incumbrance or obligation" referred to in Section 812(e)(1)(E)(ii) was considered by the Court of Claims in *Wachovia Bank and Trust Company v. U. S., Ct. Cl. 1958, 163 Fed. Sup. 832*, and in *Estate of D. W. Byrd Gwinn, 25 T.C. 31*. In such cases it was concluded that "incumbrance or obligation" referred to in the statute was an incumbrance upon the property, or obligation or indebtedness of the decedent that became a charge upon the property. Like effect was given such statutory language in *Ballantine, Exr. v. Tomlinson, C. A. 5th 1961, 293 Fed. 2d 311*. It is clear from the language of the Senate Report, supra, that by use of the words "incumbrances or obligations" in the statute Congress had in mind an indebtedness or charge against the estate of the decedent or on the property passing thereby.

The Government would segregate the last sentence in the quotation from such report, and the illustration there given, and would take the position that such illustration is a comparable illustration to the fact situation here involved. It is submitted, however, that such sentence, either standing alone or in conjunction with the remainder of the paragraph, cannot support this construction. The parenthetical expression in such sentence of "or a charge on the property" clearly refers and defines the word "agreement" immediately preceding such language. Additionally, the use of the word "payment" connotes some obligation or indebtedness of the decedent which would constitute a charge upon the property passing to the surviving spouse. To read the sentence as the Government reads it is to read it out of context.

Clearly the language of the Senate Report as well as the statute, refers to a payment to be made out of property passing to the surviving spouse under the will or a charge upon the particular property and as pointed out in the District Court opinion (R. 28, 43) recognizes "certain contingencies which would be relevant to the value of the property identified with the marital deduction."

If the surviving spouse had no property of her own and was required to make the payment referred to in the last sentence of the quoted portion of the report to a third party, then such payment must be made out of the property received by the surviving spouse under the will. This clearly would be a charge upon the property and is obviously the type of obligation or charge on the property to which the Senate Report refers.

The "incumbrance or obligation" referred to in Section 812(e)(1)(E)(ii) is in effect defined by the statute itself when it is required that such incumbrance or obligation be "taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined." In *Wachovia Bank and Trust Company v. United States, Ct. Cl. 1958, 163 Fed. Sup. 832*, the Court of Claims states at page 836:

> "Within certain limitations which are not here relevant, an estate is entitled to deduct the actual value of property which has passed from the decedent to the surviving spouse. We think this is the plain intention of Sec. 812(e)(1)(E)(ii) which refers to the gift tax standard for valuation of incumbered property. The rule there stated is a simple one: if the property received by the surviving spouse is incumbered by an obligation which has not been discharged, then, obviously, its value to the recipient is only the equity and the marital deduction is correspondingly reduced. But if the decedent's estate is obligated to discharge the incumbrance, and there are sufficient assets so that the incumbrance is actually discharged, the value of the property to the recipient is the full market value and there is no corresponding reduction in the amount of the marital deduction. Estate of Gwinn, 1955, 25 T.C. 31."

The amount of a gift from H (husband) to W (his wife) on the condition that W give a part of her property to C (children) would not be reduced in determining the amount of gift taxes attaching to H's gift to W by the amount W gave to C. The gifts are not "netted" under such circumstances in determining the liability of H as donor for gift taxes. H's gift to W is reduced only by a consideration in

money or moneys worth passing from W to H, and not by a consideration passing from W to C. *Commissioner of Internal Revenue v. Wemyss, 324 U. S. 303; Merrill v. FAHS, 324 U. S. 308.*

The Government does not claim that any consideration in money or money's worth passed to Mr. Stapf, but merely that Mrs. Stapf suffered a detriment. Such a consideration, even if it might be considered a consideration at common law, is not such a character of consideration as would reduce the value of the property passing to Mrs. Stapf if the property is to be valued "as if the amount of a gift to such spouse of such interest were being determined" as required by Section 812(e)(1)(E)(ii).

The Government's contention is directly contrary to the holding in *Commissioner of Internal Revenue v. Wemyss, 324 U. S. 303.* In such case this Court had before it a situation in which the taxpayer had transferred to a Mrs. More a block of shares of stock pursuant to an agreement between himself and Mrs. More whereby she agreed to marry him. The former husband of Mrs. More had set up a trust which was to pay income to Mrs. More until she remarried and the transfer of stock to her was to compensate her for the loss of the income she would suffer on her remarriage. Just as the Government contends here, that the value of the separate property passing to Mrs. Stapf under Mr. Stapf's will should be reduced by the value of the community property relinquished by Mrs. Stapf, the taxpayer in *Wemyss* contended that the value of stock transferred to Mrs. More should be diminished by the value of the trust income that Mrs. More

relinquished. This Court in holding that the donor made a taxable gift to Mrs. More of the full value of the stock transferred to her, stated:

> "If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift, we think the Tax Court was correct. See Commissioner of Internal Revenue v. Bristol (CAA 1st) 121 F(2d) 129. To be sure, the Revenue Act of 1932 does not spell out a requirement of benefit to the transferor to afford relief from the gift tax. Its forerunner, Sec. 320 of the (June 2) 1924 Act, 43 Stat 253, 314, c 234, 26 USCA Int Rev Acts 1940 ed p 81, was more explicit in that it provided that the excess of the transfer over 'the consideration received shall * * * be deemed a gift.' It will hardly be suggested, however, that in re-imposing the gift tax in 1932 Congress meant to exclude transfers that would have been taxed under the 1924 Act. *The Section taxing as gifts transfers that are not made for 'adequate and full (money) consideration' aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of 'adequate and full consideration' would violate the purpose of the statute and open wide the door for evasion of the gift tax.*" (Emphasis supplied.)

In *Estate of Koert Bartman, 10 T. C. 1073*, it was pointed out that the gift tax is an excise tax imposed, not upon the receipt of property by the donee, but upon the act of the donor of making the gift, and that the tax is measured by the value of the property passing. It was held there that where a husband gave his children certain property in consideration of their undertaking to pay an annuity to the donor and a contingent annuity to the donor's wife,

should she survive, that the value of the annuity to the donor should be deducted in valuing the property transferred, but no deduction should be made for the annuity undertaken by the donee for the benefit of the wife of the donor, who was a third party to the transaction. What the Government here insists should be done is in direct conflict with the decision of the Tax Court in such case. See also *Estate of John M. Goetchius, 17 T. C. 495; Commissioner of Internal Revenue v. Bristol, CCA 1st, 121 Fed. 2d 129; Lowndes and Kramer Federal Estate and Gift Taxes (2d Edition, 1962), p. 683, Sec. 32.2; Merten's Law of Federal Gift and Estate Taxation, Vol. 1, p. 287, Sec. 5.11.*

The Government in its brief seeks to avoid the holding of this Court in *Wemyss* by asserting that such decision has no bearing on the issue here because, so the Government says, such case does not specifically discuss and hold that the donor's gift was there made to a prospective bride rather than to her children. This argument merely begs the question because it is clear from the opinion that this Court considered and treated Mrs. More as the donee. The attempted distinction between *Wemyss* and the present fact situation is unwarranted because in *Wemyss* the Court had for determination the value, for gift tax purposes, of a gift from first party to second party, on what the Government would here characterize as a condition that second party would as a result of her action (marriage) give a part of second party's property to third party. This is the type of situation that the Government contends exists here, namely, by the widow's action (election) she gives a portion of her

property to third parties. The Government's attempted distinction is groundless. Here as in *Wemyss* there was no exchange of property between Mr. Stapf and Mrs. Stapf. Mr. Stapf received no consideration in money or money's worth, hence the value of the property he surrendered is not to be reduced under Section 812(e)(1)(E)(ii) because it is there required to be valued as if he were making a gift to Mrs. Stapf and the amount of such gift were being determined for gift tax purposes.

In putting emphasis on the word "any" and "in any manner" in Section 812(e)(1)(E)(ii) the Government distorts the purpose of the whole marital deduction provision and, as has been shown above, ignores the latter part of the statute that lays down the rule that the property to be excluded is to be valued as if the amount of a gift were being determined.

In *Estate of D. Byrd Gwinn, 25 T. C. 31*, the Tax Court had occasion to examine the section of the statute now under consideration. The decedent Gwinn was indebted to a bank and to secure the debt an insurance policy in which the decedent's wife was the beneficiary was pledged. The debts were paid by the decedent's administrator out of other assets of the estate. The question was whether the insurance proceeds qualified for the marital deduction or whether such policy was to be treated as being incumbered and applied to the payment of the decedent's debt to the bank thereby reducing its value, for marital deduction purposes, by the amount of the incumbrance. The Commissioner contended that the phrase "in any manner", referring to

the incumbrance, excluded, without exception, all property that was incumbered and that, therefore, the policy had a zero value for marital deduction purposes. The Tax Court rejected the contention of the government, and held that the object of the search was the value of the policy and, if the policy were to be valued as if it were a gift, that its value could not be diminished by the fact that it was pledged to secure the decedent's debt, where this debt was satisfied out of other property of the estate.

The Tax Court made a distinction between the situation, where there were not sufficient assets in the estate and the insurance proceeds had to be used to pay the debt, and where it was not necessary to use the proceeds for such purpose. A similar distinction is made by way of example in the portion of SENATE REPORT 1013 above quoted. The same distinction is applicable here. If Mrs. Stapf had been required to satisfy an incumbrance or obligation *out of the property* that passed to her from Mr. Stapf, then the value of the property passing to her would be reduced correspondingly. As we have seen, this was not the case, because the condition on which the property passed to Mrs. Stapf was that she make a gift *out of other property* that was hers, and over which the decedent had no control. Mrs. Stapf did not satisfy any debt or obligation of the decedent.

In its brief the Government advances an additional argument that wholly ignores and fails to comport with the factual situation here presented. It is contended by the Government that the last sentence in Section 812(e)(1)(E)(ii), in referring to the gift statute for the purpose of determin-

ing the *amount* of a gift, refers not to Section 1002 of the Revenue Code of 1939, relating to transfers for less than adequate and full consideration, nor to Section 1005 of the Revenue Code of 1939, relating to the valuation of gifts made in property, but refers to Section 1000(b) referring to the method of transfer and whether the gift is direct or indirect.

Under this argument the Government contends, in effect, that Mr. Stapf did *not* in fact make a testamentary gift of his separate property and interest in the automobile *to Mrs. Stapf*, but on the contrary that he made a gift to the trustees for the benefit of the children of a portion of Mrs. Stapf's one-half interest in the community property equal in value to one-third interest in his separate property and one-half interest in the automobile ($22,366.66). Such argument is fallacious because such method of reasoning ignores: the undisputed facts that $22,366.66 of Mr. Stapf's property passed to Mrs. Stapf under the will; the established law that Mrs. Stapf's ½ interest did not become become a part of Mr. Stapf's estate; the requirements of the very statute under consideration that the amount of the property passing to the surviving spouse is to be determined as if it were a gift; and the decision of this Court in *Wemyss* that such a gift is not to be reduced in value by the amount of a gift by the donee to a third party.

The title to the separate property and one-half interest in the community property automobile was unquestionably vested in the decedent, Mr. Stapf. The absolute title to the one-third interest in the separate property and the one-

half interest in the community automobile unquestionably passed to and vested in Mrs. Stapf absolutely without any interest being retained in the testator, as is required by Section 812(e) as explained by SENATE REPORT 1013, March 16, 1948, U. S. Code Cong. Service, Part 8, 80th Congress, 2d Session, p. 1163. The property that Mrs. Stapf surrendered and gave to the trustees for the benefit of her children was a part of her one-half interest in the community property and never became a part of Mr. Stapf's estate even upon her election to take under the will of her husband, GCM7773, CB IX-2, p. 426, Ruling 33-4750.

The position of the Government is that there were not two occurrences as the result of the exercise of the option by Mrs. Stapf after the death of her husband, namely, (1) the transfer of property from the decedent under his will to Mrs. Stapf that was subject to estate tax consequences, and (2) the gift by Mrs. Stapf to the trustees for the benefit of her children that was subject to gift taxes; but on the contrary, only one occurrence as a result of Mrs. Stapf's election, namely, a constructive or imagined transfer from Mr. Stapf to the trustees of a part of Mrs. Stapf's property. Such position of the Government is defeated by its reliance on the very cases on which it relies, namely, the decisions in *Commissioner v. Siegel, C. A. 9, 1957, 250 Fed. 2d 339;* and *Chase National Bank v. Commissioner, 25 T. C. 617, reversed on other grounds, C. A. 5, 259 Fed. 2d 231.* These cases involve the gift tax liability of surviving spouses for gifts made to third parties as a result of their

election to take under the will of their deceased spouse. These cases recognize, just as Mrs. Stapf recognizes here, that gift tax consequences attach to her gift of a portion of her fully vested property to the trustees for the benefit of her children. The other cases cited by the Government, *Vardell's Estate v. Commissioner, C. A. 5, 307 Fed. 2d 688,* and *Whiteley v. United States, W. D. Wash. 1963, 214 Fed. Supp. 489,* do not involve comparable situations. The last case *(Whiteley)* involved and agreement between the husband and wife during their lifetimes. The opinions in *Vardell* and in this case were by the same court, by the same judge and were certainly not considered to be in conflict.

This Court was not called upon to pass upon the decision in any of these cases, except on other points in *Chase National Bank,* either by appeal or petition for writ of certoriari. Unless distinguishable upon the facts, the decisions in *Siegel,* and the Tax Court decision in *Chase National Bank,* are in conflict with reasoning and the principles announced by this Court's decision in *Helvering v. Butterworth, 290 U. S. 365, 369-380.* Neither *Siegel* nor *Chase National Bank* involve estate taxes, or the liability for estate taxes, of the decedent's estate where the testator put the surviving spouse to the elections required in such cases. None of the cited cases involve the questiton of the marital deduction in the decedent testator's estate. Whether, under such circumstances, the decisions would have been the same is not known.

Perhaps, where a marital deduction has been allowed with respect to property passing to the wife as a result of

her election to take under the will, the full amount of a gift by her to third parties should be taxed in order to construe the gift tax statute in harmony with the estate tax statute. This problem as not been presented or passed upon in any reported decision and should properly await it presentation in a case involving the liabiliy for gift taxes in such circumstances. The problem is not presented in this case involving the estate tax liability of the decedent.

The Government contends that the gift tax liability of the surviving spouses, so determined in such cases, should fix and determine, in this case, the liability of Mr. Stapf's estate for estate taxes by netting the amounts surrendered by Mrs. Stapf against the amounts received by her. The Government contends that if this is not done the amount of the gift that Mrs. Stapf gave to her children escapes gift taxes to the extent of the value of property received by her. Even if this be true and the decision in *Siegel*, *Whitely* and the Tax Court decision in *Chase National Bank* correctly state the gift tax law applicable to *Mrs.* Stapf's gift to the trust, this does not authorize, as was determined by both the District Court and the Court of Appeals herein, the imposition of an estate tax in Mr. Stapf's estate without statutory authority.

Even though a portion of the value of Mrs. Stapf's property given to the trustees for the benefit of the children escapes gift taxes in an amount equal to the value of the property received by her under Mr. Stapf's will, certainly this does not authorize the levy of an estate tax on or the application of the estate tax rates to the property given by

Mrs. Sapf to her children. Such property so given to the children is, at the most, subject to gift taxes, but not estate taxes. Language authorizing the imposition of an estate tax on a gift, subject to gift tax, is not to be found in either the estate or gift tax statutes or the legislative history of either of such statutes.

If, by reason of the application of the gift tax statutes, a portion of the property given by Mrs. Stapf to her children will escape gift taxes, such problem is not here presented and this is a matter to be dealt with by Congress and not by the courts, as was pointed out by the Court of Appeals (R. 73-74). *The Hanover Bank, Executor v. Commissioner of Internal Revenue, 369 U. S. 672; Fabreeka Products Co. v. Commissioner, CA 1st, 294 Fed. 2d 876, 879; Commissioner v. Acker, 361 U. S. 87, 93; Helvering v. Sabine Transportation Company, 318 U. S. 306; Helvering v. Powers, 293 U. S. 214.*

The property passing to Mrs. Stapf from the decedent and qualifying for the marital deduction will not escape estate taxes because such property will be taxed in her estate upon her death in accordance with the intent of Congress in adopting marital deduction provisions.

In support of its contention that the deceased husband made a constructive gift (such term is used for lack of a better description) of his wife's property to the trustees for the benefit of their children, and that the value of the admitted testamentary gift to his wife should be netted against the property passing to the children so as to produce

a negative value for marital deduction purposes, the Government relies upon the provisions of Section 1000(b) of the Revenue Code, the regulations thereunder, and the decisions in *Helvering v. Hutchings, 312 U. S. 393*, and *Estate of Bartman v. Commissioner, 10 T. C. 1073, 1080*. None of the citations give credence to such position.

Helvering v. Hutchings, supra, involved the question of whether separate exemptions could be claimed for gift tax purposes for each of the beneficiaries of a trust where property had been given to one trustee for the benefit of several beneficiaries, or whether only a single exemption was permitted under the gift tax statute. The question there presented has no relation to the present problem and furnishes no guide here. No property was given to Mrs. Stapf in trust or otherwise for the benefit of their children. Whatever benefit the Stapf children receive comes from Mrs. Stapf as a result of the gift by her of her property and not from Mr. Stapf.

Estate of Bartman v. Commissioner, 10 T. C. 1073, cited by the Government likewise fails to give help to the Government's claims. We have previously pointed out that in such case the husband joined by his wife (who had only a dower or expectancy) made inter vivos gifts to their children in return for their agreement to furnish annuities to their father (donor) and their mother. It was held in line with the principles annuonced in *Commissioner v. Wemyss, 324 U. S. 303*, that the gift by the father should be reduced by the value of the annuity that he was to receive, but not by the value of the annuity passing to the mother, who, because she

had no vested interest in the property given to the children, was a third party since no money consideration was received by the donor (father) as a result of the annuity passing to the mother. This decision instead of supporting the Government's claims, support respondent taxpayer's position that the value of the property passing to Mrs. Stapf is to be valued "as if the amount of a gift to such spouse of such interest was being determined". Thus, the amount of the property so passing to Mrs. Stapf is to be reduced, as in the case of a gift, only by the money consideration passing to the testator and not by the amount passing from Mrs. Stapf to the children.

A third situation was presented in *Estate of Bartman*. The donor desired to give one of his sons (K. B., Jr.,) money and other of his children land, gave to three of his children (F., A. and R.) separate tracts of land and each of them, at donor's request, executed notes and delivered same to K. B., Jr., for $5000.00 each which were secured by mortgages on each of the separate tracts of land given to F., A., and R. The Court found with the petitioner that it was the intent and desire that these notes or obligations should be carved out of the total gifts. Such holding by the Tax Court is a clear example of what respondent taxpayers submit is the true meaning of Section 812(e)(1)(E)(ii) where reference is made to an "obligation" and SENATE REPORT 1013 explaining such section where reference is made to a "charge on the property". Such an "obligation" or "charge" on the property given to F., A., and R., reduced the value of the property passing to them. In an estate tax situation of the

nature here presented, the amount of their obligation, that was a "charge on the property" passing to them would be taken into consideration in valuing the property passing to them for the purpose of determining the amount of the marital deduction just as any other incumbrance or lien on the property so passing.

Section 1000(b) of the gift tax statute and the regulations thereunder, Regs. 108 (1939 Code) Section 86.2(a) Ex 2 and 3, relied upon by the Government likewise fail to give support to the Government in the fact situation presented by this case. Such portion of the statute and regulations thereunder relate to the question of whether a gift is made and do not relate to the valuation of the property passing. Section 1000(b), the Senate Report, Regulations 86.2, and the examples given therein, relate to different factual situations than here involved and are intended to cover and include for gift tax purposes inter vivos transactions of a different nature than here presented. As determined by the trial court and the Court of Appeals, it is the valuation sections of the gift tax statute to which reference is made in Section 812(e)(1)(E)(ii), and under such valuation sections the unincumbered property passing is to be reduced in value only if the consideration returning to the donor is in money or money's worth.

Contrary to the Government's assertion that the opinion of the District Court and the Court of Appeals thwarts the intent of Congress when it adopted the marital deduction provisions, the adoption of the Government's position would destroy what Congress intended and enacted. As pointed out

in SENATE REPORT 1013, March 16, 1948, U. S. Code Cong. Service, Part 2 80th Congress, 2d Session, pp. 1163, 1188, "The basic differences between property rights in community-property and non-community-property States have also resulted in geographic inequalities in the effect of the estate and gift taxes." As has often been said, the purpose of the adoption of the marital deduction provisions was to eliminate such geographic inequities recognized as unjust by Congress. It was recognized in the Senate Report last referred to on p. 1189, as follows:

> "With the repeal of the 1942 amendments your committee recommends estate and gift tax splitting which is similar in its effects to the splitting of the income tax provided for in this bill. It is recognized that complete equalization of the estate and gift taxes cannot be achieved because of the inherent differences between community property and non-community property. However, the new provisions will result in equality in the important situations."

Respondent taxpayers agree with the statement of the Government on p. 14 of its brief as follows:

> "The purpose of the marital deduction was to extend to taxpayers in common-law jurisdictions the advantages of estate 'splitting' previously enjoyed only by taxpayers in community-property jurisdictions—namely, the lower total tax resulting from the application of progressive estate-tax rates separately to two halves rather than to one whole."

The adoption of the theory asserted by the Government in denying the marital deduction in this case will bring back the situation that existed between 1942 and 1948, where the property passing to Mrs. Stapf would be taxed twice, once in Mr. Stapf's estate and again in Mrs. Stapf's estate.

The *Siegel* case and other cases cited by the Government, involving gift tax liability of the surviving spouse in respect to the valuation of property given by the surviving wife to third parties, were decided without respect to what had been the liability of the estate of the deceased husband for estate taxes. If, as the Government contends, the estate tax liability of Mr. Stapf's estate is to be controlled by the liability of Mrs. Stapf for gift taxes or by Example 3 the regulation of the Commissioner [Reg. 105, Sec. 81.47c(b)] which is directed at community property estates alone, then the same inequities sought to be eliminated by the Revenue Act of 1948 will again exist. This is true because in a community property state, where each of the spouses owns a ½ vested interest, the property passing from the husband to the wife and otherwise qualifying for the marital deduction would be taxed twice; whereas in a non-community property state under regulation 105 Sec. 81.47c(b)(3) (applying to a community property state) the marital deduction would presumably be allowed and such property would be taxed only once.

Actually, in a non-community property state the same incorrect result of taxing the same property twice for estate tax purposes will follow if the Government's theory is applied in a like situation (where the wife owns separately vested property) in such a state even though the example in the regulations applies by its terms only to community property states. In a non-community property state, where the husband has the power of testamentary disposition of the entire property accumulation of the marriage, subject to

the dower or similar rights of the wife, a situation comparable to the one here involved could not arise unless the wife owned in her own right a vested interest in property of her own. This is true because by the express terms of the statute a dower, or statutory interest in lieu thereof, is defined to "pass" from the deceased husband to the surviving spouse, and qualifies for the marital deduction. See *Sec. 812(e)(3)(C) of 1939 Code; United States v. Crosby, C.A. 5th, 257 Fed. 2d 515; United States v. Traders National Bank of Kansas City, C.A. 8th, 248 Fed. 2d 667; Dougherty Exr. v. United States, C.A. 6th, 292 Fed. 2d 331.*

A comparable situation, to the one here involved, could arise in a common law state where the husband has the power of testamentary disposition of the entire property acquired during coverture, but the wife additionally owns property in her own right. To illustrate, suppose in such a common law state, there is total property accumulated during coverture of $200,000.00, and the husband by his will gives ½ of such property of the value of $100,000.00 to his wife on the condition that she give a portion of her separately owned and fully vested property, valued at $150,000.00, to a trust created by the husband, in his will, with the remaining $100,000.00 of the joint property. The wife elects to take under the will and makes such a gift.

Since $100,000.00 passing to the wife qualifies for the marital deduction, same should be deducted from the husband's gross estate, leaving $100,000.00 subject to estate tax in his estate. On the death of the wife the $100,000.00 she received would be subject to estate taxes in her estate.

Thus, the $200,000.00 of property acquired during coverture would be taxed only once for estate tax purposes.

Under the Government's theory the $100,000.00 passing to the wife is taxed twice for estate tax purposes though only one tax is levied under the marital deduction provisions. By refusing the marital deduction, the total $200,000.00 estate would be valued and taxed at $200,000.00 in the husband's estate and the $100,000.00 passing to the wife would again be taxed in her estate on her death.

This is clearly contrary to the intent of Congress in the marital deduction statute, yet the special provisions of the regulations, applicable to community property states, produces this result if applied to the above exampled situation in a non-community property state.

If these regulations are only applicable to community property states, as they purport to be, and the Government's theory would not be applied in common law states by the Commissioner and Revenue Agents because of a lack of regulations, an even worse result would obtain because of lack of uniformity, and the residents of non-community property states would be treated differently than residents of community property states contrary to the express purpose for the adoption of the marital deduction provisions.

The fear of the Government that "startling" tax evasion results can be obtained in non-community property states as a result of the decisions of the District Court and Court of Appeals herein is without foundation.

Neither the statute nor the decisions below authorize a marital deduction in a situation where the widow owns no vested property of her own, in either a community property or non-community property state as envisioned in footnotes 14 and 15 on pages 15 and 16 of petitioner's brief and as suggested in the argument of the Government on such pages of its brief. The hypothetical or exampled situations there listed, and particularly the one noted on page 16 (footnote 15), where the husband's will gave to the wife (who owned no property) $100,000.00 on the condition that she give $100,000.00 of General Motors Stock to her son, evidence a misconception by the Government of the position of the respondents and the effect of the decisions below.

The Government argues that a marital deduction could be obtained in such a hypothetical situation and both estate and gift tax avoided by the widow using the testamentary gift of $100,000.00 to her to buy the required stock to give to her son. Such is not the case, because the requirement or obligation that the widow acquire and give the General Motors stock to her son is clearly "a charge upon the property" (as used in SENATE REPORT 1013) passing to her since her obligation *could only be satisfied out of the property passing to her.* In valuing the property passing to the widow under such circumstances, Sec. 812(e)(1)(E)(ii) would require the "obligation" or "charge on the property", to acquire the $100,000.00 of General Motors stock out of the property passing to the widow, to be deducted from the $100,000.00 bequest in valuing the property passing to her and thus determining the amount of permissible marital

deduction because the obligation, incumbrance, or charge on the property could only attach to the property so passing. Respondents do not contend otherwise. The opinions below do not hold otherwise. The Government, in such a situation, could ill afford to claim otherwise.

The hypothetical case in footnote 15 of the Government's brief is a similar or parallel illustration to the illustration in SENATE REPORT 1013 as reported on page 1228, U. S. Code Cong. Service, part 2, 80th Congress 2d Session, where it is stated:

> "If the decedent bequeath certain property to his surviving spouse subject, however, to her agreement or a charge on the property, for the payment of $1,000 to X, the value of the bequest (and, accordingly, the value of the interest passing to the surviving spouse) is the value, reduced by $1,000, of such property."

This is obviously the same situation illustrated in Example No. 1 of Regulation 105, Sec. 81.47c(b).

The Government's hypothetical situation and the examples in the Senate Report and the regulation are entirely different from the situation here presented. Mrs. Stapf was given the option of taking her part of the community property passing under the will to her or taking her one-half of the net community property. She exercised her option to take under the will after the death of her husband as a matter of free choice. She received the property passing to her under the will and gave a part of her property, never included in the estate of her husband, to the trustees for the benefit of her children and her gift is subject to such gift tax consequences as may be imposed by the gift tax

statute. If the marital deduction is denied by netting, for estate tax purposes, what she gave and what she received, and the value of the property passing to her is thereby reduced to zero, as Government contends should be done, an estate tax, at estate tax rates but not gift tax rates, is effectively levied on a part of Mrs. Stapf's property given by her to her children and subject to gift tax, but not estate tax. Respondents submit such a levy is unauthorized under any statute.

II

Because the law of Texas authorizes and allows payment of all community debts out of decedent's one-half of the community estate under a will provision expressly directing such payment, decedent's estate is entitled to a deduction for estate tax purposes of the entire amount of such community debts.

The basic reason that decedent's estate is entitled to a deduction of the full amount of community debts as claims against the estate is that, if effect is to be given to the direction in decedent's will for the payment of all such debts from his one-half of the community as the State law requires, the entire amount of such community debts meet and satisfy the criteria set up by the applicable code provision, Sec. 812(b), for deduction of "claims against the estate".

In determining the deficiency, the Commissioner allowed as a deduction in the decedent's estate only one-half

($16,183.87) of the total claims. The action of the Commissioner was approved by the District Court but reversed by the Court of Appeals with Judge Wisdom dissenting.

Section 812 of the Internal Revenue Code of 1939, as amended, being the applicable statute, provides in part:

"Section 812 Net Estate

"For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

"(a) Exemptions. An exemption of $100,000;

"(b) Expenses, losses, indebtedness, and taxes. Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate,

"(4) * * *

"*as are allowed by the laws of the jurisdiction*, whether within or without the United States, *under which the estate is being administered*, * * *." (Emphasis supplied.)

This section is the same as Section 303 of the Revenue Act of 1926 with respect to which it was said by the Circuit Court of Appeals, Third Circuit, in *First-Mechanics Nat. Bank of Trenton, et al. v. Commissioner of Internal Revenue, 117 Fed. 2d 127:*

"Unquestionably, a claim against a decedent's estate which is allowed by the laws of the jurisdiction under which the estate is administered is deductible in deter-

> mining the net estate subject to federal tax. The Revenue Act applicable to the instant case specifically so provides."

See also *Lang's Estate v. Commissioner of Internal Revenue, by Circuit Court of Appeals, 9th Circuit, 97 Fed. 2d 867; Thompson v. Wiseman, CCA 10th Cir., 233 Fed. 2d 734.*

Uniformity in the application of the statute with respect to deductions was not expected by Congress as pointed out by the U. S. Court of Appeals for the Third Circuit in *Commissioner v. Cardeza's Estate, 173 Fed. 2d 19, at 23:*

> "The question of deductibility of the $25,000 trust for mausoleum manintenance need not long detain us. As the Tax Court pointed out, the statute allows a deduction for 'such amounts * * * for funeral expenses * * * as are allowed by the law of the jurisdiction under which the estate is being administered.' *Here, then is an instance where Congress, rather than attempting uniformity, specifically has contemplated that local low determine the quantum of the deduction.* We need not gloss over the already clear picture of Pennsylvania's attitude toward funeral expenses which is set forth in the Tax Court opinion." (Emphasis supplied.)

In practice, uniformity in treatment of deductions by the estate is certainly not achieved. Perhaps the lack of uniformity can best be illustrated by a reference to a few of the community property states. Thus, funeral expenses are deducted in their entirety from the ½ community property interest of the decedent if the estate is administered in Texas *(Blair v. Stewart, 49 Fed. 2d 257, 5th Cir., cert. denied; 284 U. S. 658)*, or in Idaho *(Estate of W. S. Lee v. Commissioner, 11 T. C. 141)*, while only ½ of the funeral

expenses are deducted if the estate is administered in the State of Washington *(Lang's Estate v. Commissioner, 97 Fed. 2d 867; The Pacific National Bank of Seattle, 40 B. T. A. 128.)*

In the absence of will provisions otherwise directing, only ½ of the administration expenses are deducted in Texas upon the theory that the whole of the community estate is being administered. *Estate of H. C. Schuhmacher, 8 T. C. 453.* The same is true in the State of Idaho, *Estate of W. S. Lee, 11 T. C. 141*, but the contrary is held in the State of Louisiana, *Vaccaro v. United States, 55 Fed. Supp. 932, affirmed CCA 5th, 1945, 149 Fed. 2d 1014; McCullough v. United States, 134 Fed. Supp. 673; Estate of Thomas E. Gannett, 24 T. C. 654; Estate of William G. Helis, 26 T. C. 143.*

Regardless of whether all of the administration expenses, and not merely a pro rata part thereof, and all of the community debts, and not merely ½ thereof, are to be deducted from the community ½ interest of the deceased spouse who might die intestate, or where there was no provision in the will with respect thereto, it is submitted that where the will specifically directs that *all* of the administration expenses and *all* of the debts, and not merely part thereof, be charged against and collected out of the decedent's ½ community interest, that then the provisions of the will must be carried out, and such debts and expenses must be charged against and deducted from the ½ share being administered in determining the liability for estate taxes.

The principle asserted by these respondent taxpayers was clearly recognized and set forth by the Board of Tax Appeals of the United States in *Estate of Eucy O. McGugan, Deceased, 47 B. T. A. 658*, in which the Commissioner of Internal Revenue acquiesced. The headnote of syllabi appearing in the official Board of Tax Appeals report clearly states in shortened form the holding of the Court as follows:

> "Funeral expenses and expenses of last illness of a married woman dying testate a resident of Florida, paid pursuant to the terms of the last will and allowed by the laws of the state as a charge against the gross estate, HELD a legal deduction from the gross estate."

The facts in the case were that the will of Mrs. McGugan provided:

> "I direct that all of my just debts and funeral expenses be paid out of my estate as soon after my decease as shall be found convenient."

The decedent was survived by her husband, Arthur McGugan. Under the laws of the State of Florida the surviving husband was primarily liable for the payment of the funeral expenses. The Court, however, gave effect to the provisions of the will and required that the funeral expenses be paid out of the estate of the decedent pursuant to the terms of the will and deducted from the gross estate in determining the net taxable estate. The Court in such regard said:

> "* * * It has been held that, even though under the common law these expenditures are regarded as primary liabilities of the surviving husband, the husband is relieved of such liability where the wife directs in her will that they be paid out of her estate and leaves sufficient property for their payment.

"It is clearly the purpose of the Federal estate tax law to permit the deduction of such items if allowed by the laws of the jurisdiction under which the estate is being administered. Since it is stipulated that the items in dispute were paid by the executor and that the administration of the estate has been closed, the items apparently were allowed as deductions from the gross estate by the laws of the State of Florida.

"We are of the opinion that the respondent erred in his disallowance of the deduction from the gross estate of the funeral expenses and expenses of decedent's last illness."

Estate of Lucy O. McGugan, Deceased, supra, was followed by the Tax Court in *Estate of Mrs. Sarah H. Bradley, Docket No. 106452, Prentice-Hall 1943 T. C. Memorandum Decisions, 1195; CCH 2 TCM 609.* There the Tax Court had under consideration whether the funeral expenses of the decedent wife should be allowed as a deduction in computing estate taxes where, under the laws of Georgia, where the estate was being adminstered, the surviving husband is primarily liable for such funeral expenses. The will in such case provided that all just debts should be paid and a marble slab erected over the grave of the decedent. The Court held that, even though the surviving husband was primarily liable for funeral expenses and his wife's estate was secondarily liable for the payment thereof in the State of Georgia, full effect nevertheless must be given to the will, and the entire amount of the funeral expenses were allowed in determining the Federal estate tax upon the estate.

The principle that community debts are deductible in their entirety from the decedent's ½ community interest for

determining estate tax liability where directed by the provisions of the decedent's will was recognized by the 9th Circuit Court of Appeals in *Lang's Etate v. Commissioner, 97 Fed. 2d 867*, where it is stated at page 871:

> "On this issue we think the Board was correct in permitting a deduction of only one-half of these community obligations. Regardless of the incidents of the husband's personal liability for community debts during his lifetime, section 1342, Remington's Revised Statutes, supra, as construed by the Supreme Court of Washington, requires that community debts be satisfied pro rata from that portion of the community property distributable to the wife and that portion subject to the husband's testamentary disposition. *It is only by provision of a deceased husband's will that a community debt may be charged solely against his share of the community. Redelsheimer v. Zepin*, 105 Wash. 199, 202, 177 P. 736; in re *Hart's Estate*, 150 Wash. 482, 492, 273 P. 735." (Emphasis supplied.)

The right of a testator to charge community debts and administration expenses against his ½ part or share of the community estate where same would not otherwise be chargeable in its entirety, is recognized: in the State of Washington, *Lang's Estate v. Commissioner of Internal Revenue, supra; Redelsheimer v. Zepin, 105 Wash. 199, 202, 177 Pac. 736; In Re: Hart's Estate, 150 Wash. 482, 492, 273 P. 735;* and in the State of California, where it was stated in *In Re Marinos' Estate, 102 P. 2d 443:*

> "The law is clear that in the absence of an expression of a contrary intent, the entire community property, including the interest of the surviving widow, is subject to the debts and expenses of administration upon the death of the husband. * * * The converse is also true—

that is, if the will designates that debts should be paid from the interest of the husband, the wife's share of the community property is exonerated, if the husband's share is sufficient to pay all such debts and expenses. * * *"

The rule so clearly stated in the case last cited is the rule in Texas. Debts and administration expenses, though chargeable against the entire community estate in the absence of specific provisions to the contrary, are chargeable in their entirety against the deceased husband's one-half where the will so directs. This rule of law is made clear by the Court of Civil Appeals for the Seventh Supreme Judicial District at Amarillo in the case of *Medlin v. Medlin, 203 S. W. 2d 635*, and by the Supreme Court of Texas when a writ of error was refused in such case.

Thus, it appears that the point here urged has been squarely placed before the Supreme Court of Texas, and it has squarely ruled that the testator may, by his will, relieve his wife's share of the community estate of liability for the payment of community debts to the extent that testator's share is sufficient to discharge such debts and expenses, even in a case where the debts exceeded the one-half community interest of the deceased.

Other Texas cases recognize the right of a testator to direct that debts and expenses be paid out of certain portions of his estate, and that the determination of whether debts, expenses, or administration and attorneys' fees should be borne by the community estate depends upon the intent of testator as expressed in his will. We refer to *Thompson v. Thompson*,

236 S. W. 2d 779, 149 Tex. 632, and *Matthews v. Jones, 245 S. W. 2d 974, writ refused.* In the case last cited the decedent had written a will and various codicils. The suit involved the question of who should be charged with the debts and expenses under the will and codicils. It is stated at page 977:

> "Judgment was entered in the District Court exonerating one-half of the separate property left in trust for the widow from payment of expenses of last illness and funeral, indebtedness of decedent for benefit of separate property, one-half of community indebtedness, expenses of administration of entire separate property and one-half of the community estate, the federal estate tax, all inheritance taxes, and charging the one-half of the community estate and one-half of the separate property left in trust for the children with the payment thereof.
>
> "• • •
>
> "It urged by appellants that the will of Percy Jones 'made no provision, ambiguous or otherwise, as to apportionment of the burden of debts, expenses of administration or taxes among the beneficiaries' and that 'the court should have placed the burden, as a matter of law, and not of construction;' that, as a matter of law, the property devised in trust for the widow should be charged with a pro rata share of such items. The determination of the question here presented hinges upon the intention of the testator as expressed in the will, as evidenced by its terms when considered as a whole if his intent can be determined therefrom."

There can be no question with respect to the intent of the testator, Lowell H. Stapf, to charge all, and not merely ½ of the debts to his ½ share and part of the community estate until its exhaustion, and next to the separate estate. It is

equally clear that the same was true with respect to administration expenses, including attorneys' fees incurred in connection with the administration of the estate.

Under the cases above cited, it cannot be questioned that the testatof, Lowell H. Stapf, was fully authorized and empowered to charge his share and portion of the community estate with all of the community debts and all of the costs of administration and to exonerate the ½ share of Mrs. Stapf in the community property from such debts and expenses. It cannot be questioned that Mr. Stapf did in his will everything possible to charge his ½ of the community estate with such debts and taxes. Since Mr. Stapf was permitted by the laws of the State of Texas to do just what he did by his will; then such debts and expenses are deductibe in their entirety in determining the amount of net estate taxable for estate tax purposes because the state law determines what debts and expenses are to be deducted from the share and part of the estate being taxed, subject, however, to the limitation stated by the Court of Appeals in the opinion below, that only ½ of the debts founded on a promise or agreement are deductible.

The Government does not claim that the provision in the will directing payment of all debts and expenses out of decedent's one-half of the community property is invalid or ineffective under Texas law. The Government asserts that these Texas decisions are not controlling because they do not concern the deduction of the claims for estate tax purposes. The opinion of the Court of Appeals appropriately disposes of this contention with its observation that, "It is true that

neither of these cases involved taxes, but the regulation here requires only that the payment be authorized under the Texas law. Cf. *In re Marinos' Estate, Cal. Dist. Ct. App. 1940, 102 P. 2d 443.*" (R. 64, 69.) It cannot be expected that state law will speak in the area of estate tax deductions, as such, and the code clearly calls upon the state probate law to determine what claims qualify under Sec. 812(b). The last quoted part of the Court of Appeals' opinion is equally applicable to petitioner's assertion, without citation of authority, (page 20 of brief) that state law governing the enforceability of such a will provision concerns the validity of wills and does not concern the allowance of claims and is thus irrelevant. However, if such a will direction is enforceable under state law, which petitioner admits is the case in Texas, then the claimant may collect in full from decedent's estate and the estate will bear the full burden of such payment, regardless of whether this is so under the law governing validity of wills or under the law governing the allowance of claims.

The only impediment to full deduction of community debts by the estate of a deceased husband in the absence of a direction to pay such debts in full in the will, is that under "the laws of the jurisdiction" only one-half of such claims are ultimately chargeable to the decedent's estate. But that impediment does not exist in this case because the will provision makes the decedent's estate wholly responsible for the community debts. The "laws of the jurisdiction" permit a decedent to remove the impediment by such a will provision and the Government's position in this question is

necessarily in derogation of the "laws of the jurisdiction." The cases cited in petitioner's brief are not to the contrary since none of these cases involve a will situation where the testator assumed the debts and gave up any right of reimbursement from his wife's part of the community.

The Government does not quarrel with the fact that the entire amount of community debts "represent personal obligations of the decedent existing at the time of his death", as is required by Treasury Regulation 105, Section 81.36. The law of Texas is that the husband, and his estate after his death, is personally liable for community debts, whereas the wife is not. *Davis v. McCarney, 64 Tex 584; Leatherwood v. Arnold, 66 Tex. 144, 1 S. W. 173; Anderson v. Bundick, 245 S. W. 2d 318 (Tex. Civ. App., err. ref. n.r.e.)*. The fact is that the husband is the only one who is personally liable, and if a personal judgment could not be obtained against him for the full amount of community debts, it could be obtained against no one.

The Government does not deny that the decedent, while alive, was personally liable for the full amount of the community debts. Decedent's estate cannot escape such liability and if the estate pays only one-half of such claims the owners of the claims are fully entitled to obtain a judgment against the estate and collect the other one-half of their claims in satisfaction of such judgment, out of estate assets, even though the estate will have a right of reimbursement from the wife's community interest of one-half of the total claims where there is no direction in the will for payment of the entire debt out of decedent's estate.

This being true, how can it logically be argued that the claimants have a valid cause of action against the estate for the full amount of community debts, yet they have no "claim against the estate" except as to one-half of such claim. The claimants are fully entitled to file a "claim" with the executor of the estate for the full amount of the debt owed them by the community and are entitled to have such "claim" satisfied in full by the decedent's estate—such a claim is exactly what is encompassed by the Code provision allowing deduction of such "claims against the estate * * * as are allowed by the laws of" the jurisdiction where the estate is being administered.

While the Court of Appeals did not reach, and did not have to reach, the question of full and adequate consideration, the Government injects such issue into the case without warrant. The requirement of Sec. 812(b) that the deduction for claims be limited to those contracted for "an adequate and full consideration in money or money's worth" is applicable (by the very terms of the statute) to those founded upon "a promise of agreement". As pointed out by the Court of Appeals (R. 70), the debts here involved "were in the main income taxes and ad valorem taxes." These are debts imposed by law and not debts founded upon "a promise or agreement" with respect to which the consideration requirement is applicable. At no point has the Government attempted to segregate contractual claims or contended that any of the claims should be treated differently from the claims for taxes.

Petitioner asks us to look at "the transaction by which the decedent's estate became liable to pay the entire debts of the community without recourse to the wife's half" presumably referring to the will provision. Brief for the United States, p. 21. But regardless of what decedent's will provided, the United States, as a holder of income tax claims, the ad valorem taxing authorities, and the other claimants involved, each had a legal claim and cause of action against the estate for the *full* amount of his claim, not just the half chargeable ultimately to decedent's estate had there been no direction for payment of the will. These claims were not "created" by the decedent's will but rather by the taxing laws and the other underlying transactions; they were effective claims imposing personal liability on decedent without regard to his will. They were claims imposed by law, not claims based upon contract. Therefore, the requirement of full and adequate consideration in money or money's worth does not enter the picture here.

The petitioner's position appears to be dictated by a fear of tax avoidance and discrimination which it visualizes as resulting from the majority opinion of the Court of Appeals upon this point. Such fears are unfounded under the majority opinion because the opinion recognizes (R. 70), that if the "claims", for which deductions are allowed, are founded on contract ½ of the consideration (such as the proceeds of a loan) would go into the ½ community estate of the surviving wife and that under such circumstances,

the contention of the Government that only ½ such a debt (one founded on a contract) would be deductible, would prevail.

Thus, the supposed example in the dissenting opinion (R. 74, 84), and a like example in the Government's Petition for Writ of Certiorari (pg. 14 of petition), but not carried forward in the Government's brief, whereby discrimination between states would result and taxes be avoided through a manipulation of liabilities and assets of the community estate by borrowing could not occur under the majority opinion of the Court of Appeals. The supposed results in such situations are contrary to the express holding of the majority opinion, because debts or claims, created through the borrowing of funds, are clearly based on contract or agreement and deduction would be obtained under the majority opinion for only one-half of such debts since there would be full and adequate consideration to the decedent's estate for only that portion.

The manager of the community could not manipulate claims imposed upon his estate by operation of law in such a manner as to avoid taxes or provide a windfall. Congress, by providing that the claims, which are deductible, are those which are permitted by the laws of the state where the administration is pending, but limiting those claims founded on contract to those supported by a full and adequate consideration, authorized the deduction of claims imposed by law where, under the local law, the testator is allowed to assume such debts under his will. This is permissible in Texas under

the majority opinion; in Florida under *Estate of Lucy McGugan, Deceased, 47 B.T.A. 658;* in Georgia under *Estate of Mrs. Sarah H. Bradley, T.C. Docket 106452, Prentice-Hall 1943 T. C. Memorandum Decision 1195; CCH 2TCM 609,* and presumably in California and Washington under *Lang's Estate v. Commissioner of Internal Revenue, CCA 9th 1938, 97 Fed. 2d 867, 871; In Re Marinos' Estate, 102 Pac. 2d 443; Redelsheimer v. Zepin, 105 Wash. 199, 202, 177 Pac. 736; In Re: Hart's Estate, 150 Wash. 482, 492, 273 Pac. 735.*

The fact that all states may not allow and enforce such a testamentary provision is of no consequence because uniformity is intrinsically impossible to achieve under a provision that calls for the state law of the various states to govern the deductibility of claims.

The Government's position seeks to impose an unnatural meaning on the word "claim" as used in the provisions of the Code permitting deductions, and to engraft thereon language not contained in the Code. This Court has required language in the revenue laws to be given their plain, literal meaning, *Hanover Bank Executor v. Commissioner, 369 U. S. 672,* and this Court has many times affirmed the sound and accepted maxim that "where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer". *White v. Aronson, 302 U. S. 16.* The following language from *Crooks v. Harrelson, 282 U. S. 55, at 59,* is appropo:

> "It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be

> rejected as leading to absurd results, and the construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principal sought to be applied is that followed by this Court in Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511; but a consideration of what is there said will disclose that the principal is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify as departure from the letter of the law upon the ground, the absurdity must be so gross as to shock the general morale or common sense."

As is stated above, the attempted demonstrations by Petitioner of far reaching tax avoidance under the decision by the Fifth Circuit is not justified, and there is no substantial reason why the terms of the Code provisions should not be given their literal, ordinary interpretation, so as to allow decedent's estate a full deduction for the community debts.

If for any reason the debts and claims, whether arising by operation of law or as a result of a contract or agreement, as well as administration expenses on the estate of the decedent are not entitled to be deducted in determining the estate tax liability under Sec. 812(b), under the will provisions, but are to be treated and considered as merely pecuniary bequests as the Government contends, then such debts and administration expenses, so assumed by the testator, qualify for the marital deduction to the extent that such claims and exepnses when added to the value of other property, qualifying for the marital deduction, does not exceed ½ of the "adjusted gross estate."

This fact is recognized by the Government on page 15 of their Petition for Writ of Certiorari filed herein. The Government, of course, contends that no marital deduction is available in this case for the reason that Mrs. Stapf gave up more than she got. For the reasons discussed in the preceding point in this brief and for the reasons assigned by the District Court and the Court of Appeals, this is not a valid basis for denying the marital deduction in this case by netting what the wife received under the will and what she voluntarily gave to the trustees for her children by the exercise of her option.

III

Because the law of Texas authorizes and allows payment of all administration expenses out of decedent's ½ of the community estate under a will provision expressly directing such payment, decedent's estate is entitled to a deduction for estate tax purposes of the entire amount of such administration expenses.

The Court of Appeals was correct in treating administration expenses and community debts together. The deduction in full of both administration expenses and community debts, where there is a will provision directing such expenses and debts paid in full out of decedent's property is supported by the same arguments. The requirement that the debts to be deducted be personal obligations of the decedent and that

contractual debts be for a full and adequate consideration have no application to the administration expense deduction.

The only question necessary to ask is whether the law of Texas allows decedents' estates to pay administration expenses in full, with no reimbursement from the wife's share of the community, where the decedent's will direct full payment of such expenses out of his portion of the estate, as is here provided. That Texas law allows the administration expenses to be paid in full out of the decedent's estate under such circumstances, is not contested by petitioner. Such fact is clear under the decisions of *Thompson v. Thompson, 149 Tex. 632, 236 S. W. 2d 779*, and *Mathews v. Jones, 245 S. W. 2d 974, writ of error refused.*

Without repeating the arguments under the preceding Point II with respect to community debts, the reasons advanced for the allowance in deduction of such debts in full are reasserted with respect to administration expenses. By the same token, if the administration expenses are not deductible in full in determining the decedent's estate tax liability such expenses qualify for the marital deduction as discussed under the preceding point.

CONCLUSION

For the reasons herein advanced, it is respectfully submitted that the judgment of the United States Court of Appeals for the 5th Circuit should be affirmed and that this cause be remanded to the District for such other and further

proceedings as may be necessary and which are not inconsistent with the opinion of this Court and the United States Court of Appeals for the 5th Circuit.

Respectfully submitted,

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APPENDIX A

INTERNAL REVENUE CODE OF 1939 (AS AMENDED, 26 U.S.C., 1952 ED.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) [as amended by Secs. 405(a), 406, Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 502, Revenue Act of 1950, c. 994, 64 Stat. 906]. *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid

mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; * * *. There shall be disallowed the amount by which the deductions specified in paragraphs (1), (2), (3), and (4) exceed the value, at the time of the decedent's death, of property subject to claims. For the purposes of this section the term "property subject to claims" means property includible in the gross estate of the decedent which, or the avails of which, would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate; and, for the purposes of this definition, the value of the property shall be reduced by the amount of the deduction under the next sentence attributable to such property. * * *

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

* * * * *

(e) [As added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*

(A) *In general.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to

the extent that such interest is included in determining the value of the gross estate.

* * * * *

(E) *Valuation of Interest Passing to Surviving Spouse.*—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

* * * * *

(ii) where such interest or property is incumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such incumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

* * * * *

TREASURY REGULATIONS 105 (1939 CODE)

SEC. 81.36. *Claims against the estate.*—The amounts that may be deducted under this heading are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. * * * Only claims enforceable against the decedent's estate may be deducted. Except as hereinafter stated, if the claim is founded upon a promise or agreement, the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

SEC. 81.47a [as added by T. D. 5699, 1949—1 Cum. Bull. 181, 195]. *Bequests, etc., to surviving spouse.*—(a) *Allow-*

ance of marital deduction. In the case of the estate of a citizen or resident of the United States dying after December 31, 1947, there may be deducted the value of any property interest (except as otherwise provided in section 81.47b and 81.47d) which passed from the decedent to his surviving spouse. Such deduction is hereinafter referred to as the "marital deduction." The marital deduction is generally not available in case the decedent's gross estate consists exclusively of property held by him and his surviving spouse as community property under the law of any State, Territory, or possession of the United States, or any foreign country. (See section 81.47d.) * * *

* * * * *

SEC. 81.47c [as added by T. D. 5699, 1949—1 Cum. Bull. 181, 206]. *Valuation of property interest passing to surviving spouse—*

* * * * *

(b) *Property interest subject to an incumbrance or obligation.* Section 812(e)(1)(E) provides that where a property interest passed from the decedent to his surviving spouse subject to a mortgage or other incumbrance, or where an obligation is imposed upon the surviving spouse by the decedent in connection with the passing of a property interest, the value of such property interest is to be reduced by the amount of such mortgage, other incumbrance, or obligation. The passing of a property interest subject to the imposition of an obligation by the decedent does not include a bequest, device, or transfer in lieu of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or

of other marital rights in the decedent's property or estate. The passing of a property interest subject to the imposition of an obligation by the decedent does, however, include a bequest, etc., in lieu of the interest of his surviving spouse under community property laws unless such interest was, immediately prior to the decedent's death, a mere expectancy. * * *

The following are illustrative of property interests which passed from the decedent to his surviving spouse subject to the imposition of an obligation by the decedent:

(1) A decedent devised a residence valued at $25,000 to his wife, with a direction that she pay $5,000 to his sister. For the purpose of the marital deduction, the value of the property interest passing to the wife is only $20,000.

* * * * *

(3) A decedent bequeathed certain securities to his wife in lieu of her interest in property held by them as community property under the law of the State of their residence. The wife elected to relinquish her community property interest and to take the bequest. For the purpose of the marital deduction, the value of the bequest is to be reduced by the value of the community property interest relinquished by the wife.

* * * * *